

By: Rodriguez

S.B. No. 647

A BILL TO BE ENTITLED

AN ACT

relating to guardianships, including the assessment and payment of attorney's fees and other court costs in guardianships, and to court-created management trusts for persons who have physical disabilities or who are incapacitated.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Section 1051.253(c), Estates Code, as effective January 1, 2014, is amended to read as follows:

(c) At the expiration of the 10-day period prescribed by Subsection (a):

(1) ~~[commission may issue for taking]~~ the depositions for which the notice was posted may be taken; and

(2) the judge may file cross-interrogatories if no person appears.

SECTION 2. Chapter 1055, Estates Code, as effective January 1, 2014, is amended by adding Subchapter D to read as follows:

SUBCHAPTER D. MEDIATION

Sec. 1055.151. MEDIATION OF CONTESTED GUARDIANSHIP PROCEEDING. (a) On the written agreement of the parties or on the court's own motion, the court may refer a contested guardianship proceeding to mediation.

(b) A mediated settlement agreement is binding on the parties if the agreement:

(1) provides, in a prominently displayed statement

1 that is in boldfaced type, in capital letters, or underlined, that
2 the agreement is not subject to revocation by the parties;

3 (2) is signed by each party to the agreement; and

4 (3) is signed by the party's attorney, if any, who is
5 present at the time the agreement is signed.

6 (c) If a mediated settlement agreement meets the
7 requirements of this section, a party is entitled to judgment on the
8 mediated settlement agreement notwithstanding Rule 11, Texas Rules
9 of Civil Procedure, or another rule or law.

10 (d) Notwithstanding Subsections (b) and (c), a court may
11 decline to enter a judgment on a mediated settlement agreement if
12 the court finds that the agreement is not in the ward's or proposed
13 ward's best interests.

14 SECTION 3. Section 1102.005(b), Estates Code, as effective
15 January 1, 2014, is amended to read as follows:

16 (b) After examining the [~~ward's or~~] proposed ward's assets
17 and determining that the [~~ward or~~] proposed ward is unable to pay
18 for services provided by the guardian ad litem, the court may
19 authorize compensation from the county treasury.

20 SECTION 4. Sections 1155.052(a) and (c), Estates Code, as
21 effective January 1, 2014, are amended to read as follows:

22 (a) Notwithstanding any other provision of this chapter [~~or~~
23 ~~Section 665B~~], an attorney who serves as guardian and who also
24 provides legal services in connection with the guardianship is not
25 entitled to compensation for the guardianship services or payment
26 of attorney's fees for the legal services from the ward's estate or
27 other funds available for that purpose unless the attorney files

1 with the court a detailed description of the services performed
2 that identifies which of the services provided were guardianship
3 services and which were legal services.

4 (c) The court shall set the compensation of an attorney
5 described by Subsection (a) for the performance of guardianship
6 services in accordance with Subchapter A. The court shall set
7 attorney's fees for an attorney described by Subsection (a) for
8 legal services provided in accordance with Sections 1155.054
9 [~~1155.051~~], 1155.101, and 1155.151 [~~665B~~].

10 SECTION 5. Notwithstanding the transfer of Section 665B,
11 Texas Probate Code, as amended by Chapters 314 (H.B. 587) and 930
12 (H.B. 3080), Acts of the 81st Legislature, Regular Session, 2009,
13 to the Estates Code and redesignation as Section 665B of that code
14 effective January 1, 2014, by Section 3.01(e), Chapter 823 (H.B.
15 2759), Acts of the 82nd Legislature, Regular Session, 2011, Section
16 665B, Texas Probate Code, is transferred to Subchapter B, Chapter
17 1155, Estates Code, redesignated as Section 1155.054, Estates Code,
18 and reenacted and amended to read as follows:

19 Sec. 1155.054 [~~665B~~]. PAYMENT OF ATTORNEY'S FEES TO
20 CERTAIN ATTORNEYS. (a) A court that creates a guardianship or
21 creates a management trust under Chapter 1301 [~~Section 867 of this~~
22 ~~code~~] for a ward [~~under this chapter~~], on request of a person who
23 filed an application to be appointed guardian of the proposed ward,
24 an application for the appointment of another suitable person as
25 guardian of the proposed ward, or an application for the creation of
26 the management trust, may authorize the payment of reasonable and
27 necessary attorney's fees, as determined by the court, in amounts

1 the court considers equitable and just, to an attorney who
2 represents the person who filed the application at the application
3 hearing, regardless of whether the person is appointed the ward's
4 guardian or whether a management trust is created, from[+]

5 [~~1~~] available funds of the ward's estate or
6 management trust, if created, subject to Subsections (b) and (d).

7 (b) The court may authorize amounts that otherwise would be
8 paid from the ward's estate or the management trust as provided by
9 Subsection (a) to instead be paid from the county treasury, [+ or

10 [~~2~~] subject to Subsection (e), [~~(c) of this section,~~
11 ~~the county treasury]~~ if:

12 (1) [(A)] the ward's estate or [~~, if created,~~]
13 management trust[~~7~~] is insufficient to pay [~~for~~] the amounts
14 [~~services provided by the attorney]~~; and

15 (2) [(B)] funds in the county treasury are budgeted
16 for that purpose.

17 (c) [(b)] The court may not authorize attorney's fees under
18 this section unless the court finds that the applicant acted in good
19 faith and for just cause in the filing and prosecution of the
20 application.

21 (d) If the court finds that a party in a guardianship
22 proceeding acted in bad faith or without just cause in prosecuting
23 or objecting to an application in the proceeding, the court may
24 require the party to reimburse the ward's estate for all or part of
25 the attorney's fees awarded under this section and shall issue
26 judgment against the party and in favor of the estate for the amount
27 of attorney's fees required to be reimbursed to the estate.

1 (e) [~~(e)~~] The court may authorize the payment of attorney's
2 fees from the county treasury under Subsection (b) [~~(a) of this~~
3 ~~section~~] only if the court is satisfied that the attorney to whom
4 the fees will be paid has not received, and is not seeking, payment
5 for the services described by that subsection from any other
6 source.

7 SECTION 6. Section 1155.151, Estates Code, as effective
8 January 1, 2014, is amended to read as follows:

9 Sec. 1155.151. COSTS IN GUARDIANSHIP [~~COST OF~~] PROCEEDING
10 GENERALLY [~~IN GUARDIANSHIP MATTER~~]. (a) In a guardianship
11 proceeding [~~Except as provided by Subsection (b)~~], the court costs
12 [~~cost~~] of the proceeding [~~in a guardianship matter~~], including the
13 cost of the guardians [~~guardian~~] ad litem, attorneys ad litem, [~~or~~]
14 court visitor, mental health professionals, and interpreters
15 appointed under this title, shall be set in an amount the court
16 considers equitable and just and, except as provided by Subsection
17 (c), shall be paid out of the guardianship estate, or [~~the cost of~~
18 ~~the proceeding shall be paid out of~~] the county treasury if the
19 estate is insufficient to pay the cost, and the court shall issue
20 the judgment accordingly.

21 (b) The costs attributable to the services of a person
22 described by Subsection (a) shall be paid under this section at any
23 time after the commencement of the proceeding as ordered by the
24 court.

25 (c) If the court finds that a party in a guardianship
26 proceeding acted in bad faith or without just cause in prosecuting
27 or objecting to an application in the proceeding, the court may

1 order the party to pay all or part of the costs of the proceeding.
2 If the party found to be acting in bad faith or without just cause
3 was required to provide security for the probable costs of the
4 proceeding under Section 1053.052, the court shall first apply the
5 amount provided as security as payment for costs ordered by the
6 court under this subsection. If the amount provided as security is
7 insufficient to pay the entire amount ordered by the court, the
8 court shall render judgment in favor of the estate against the party
9 for the remaining amount. [An applicant for the appointment of a
10 guardian under this title shall pay the cost of the proceeding if
11 the court denies the application based on the recommendation of a
12 court investigator.]

13 SECTION 7. Subchapter C, Chapter 1163, Estates Code, as
14 effective January 1, 2014, is amended by adding Section 1163.1011
15 to read as follows:

16 Sec. 1163.1011. USE OF UNSWORN DECLARATION FOR ELECTRONIC
17 FILING OF ANNUAL REPORT. (a) A guardian of the person who files the
18 annual report required by Section 1163.101 electronically with the
19 court may use an unsworn declaration made as provided by this
20 section instead of a written sworn declaration or affidavit
21 required by Section 1163.101.

22 (b) An unsworn declaration authorized by this section must
23 be:

24 (1) in writing; and

25 (2) subscribed by the person making the declaration as
26 true under penalty of perjury.

27 (c) The form of an unsworn declaration authorized by this

1 section must be substantially as follows:

2 I, (insert name of guardian of the person), the guardian of
3 the person for (insert name of ward) in _____ County, Texas,
4 declare under penalty of perjury that the foregoing is true and
5 correct.

6 Executed on (insert date)

7 _____

8 (signature)

9 (d) An unsworn declaration authorized by Section 132.001,
10 Civil Practice and Remedies Code, may not be used instead of a
11 written sworn declaration or affidavit required by Section
12 1163.101.

13 SECTION 8. Section 1251.013, Estates Code, as effective
14 January 1, 2014, is amended to read as follows:

15 Sec. 1251.013. COURT COSTS. If the court appoints a
16 temporary guardian after the hearing required by Section
17 1251.006(b), all court costs, including attorney's fees, may be
18 assessed as provided by Sections 1155.054 and [1155.051,
19 1155.151[~~and 665B~~].

20 SECTION 9. The heading to Section 1301.052, Estates Code,
21 as effective January 1, 2014, is amended to read as follows:

22 Sec. 1301.052. VENUE FOR PROCEEDING INVOLVING TRUST FOR AN
23 ALLEGED INCAPACITATED PERSON.

24 SECTION 10. Section 1301.054, Estates Code, as effective
25 January 1, 2014, is amended by amending Subsection (c) and adding
26 Subsection (c-1) to read as follows:

27 (c) Except as provided by Subsection (c-1), the [The] court

1 shall appoint an attorney ad litem and, if necessary, may appoint a
2 guardian ad litem, to represent the interests of the alleged
3 incapacitated person in the hearing to determine incapacity under
4 Subsection (a).

5 (c-1) If the application for the creation of the trust is
6 filed by a person who has only a physical disability, the court may,
7 but is not required to, appoint an attorney ad litem or guardian ad
8 litem to represent the interests of the person in the hearing to
9 determine incapacity under Subsection (a).

10 SECTION 11. Section 1301.055, Estates Code, as effective
11 January 1, 2014, is amended to read as follows:

12 Sec. 1301.055. AUTHORITY OF COURT TO APPOINT GUARDIAN
13 INSTEAD OF CREATING TRUST. If, after a hearing under Section
14 1301.054, the court finds that the person for whom the application
15 was filed is an incapacitated person but that it is not in the
16 incapacitated person's best interests for the court to create a
17 trust under this subchapter for the incapacitated person's estate,
18 the court may appoint a guardian of the person or estate, or both,
19 for the incapacitated person without commencing a separate
20 proceeding for that purpose.

21 SECTION 12. Sections 1301.057(b), (c), and (d), Estates
22 Code, as effective January 1, 2014, are amended to read as follows:

23 (b) Except as provided by Subsection (c), the court shall
24 appoint a financial institution to serve as trustee of a management
25 trust, other than a management trust created for a person who has
26 only a physical disability.

27 (c) The court may appoint a person or entity described by

1 Subsection (d) to serve as trustee of a management trust created for
2 a ward or incapacitated person instead of appointing a financial
3 institution to serve in that capacity if the court finds:

4 (1) that the appointment is in the best interests of
5 the ward or incapacitated person for whom the trust is created; and

6 (2) if the value of the trust's principal is more than
7 \$150,000, that the applicant for the creation of the trust, after
8 the exercise of due diligence, has been unable to find a financial
9 institution in the geographic area willing to serve as trustee.

10 (d) The following are eligible for appointment as trustee of
11 a management trust created for a ward or incapacitated person under
12 Subsection (c):

13 (1) an individual, including an individual who is
14 certified as a private professional guardian;

15 (2) a nonprofit corporation qualified to serve as a
16 guardian; and

17 (3) a guardianship program.

18 SECTION 13. Section 1301.058, Estates Code, as effective
19 January 1, 2014, is amended to read as follows:

20 Sec. 1301.058. BOND REQUIREMENTS FOR TRUSTEES. (a) The
21 following serve [~~A trustee of a management trust that is a corporate~~
22 ~~fiduciary serves~~] without giving a bond in accordance with the
23 trust terms required by Sections [~~Section~~] 1301.101(a)(4) and
24 (a-1):

25 (1) a trustee of a management trust that is a corporate
26 fiduciary; and

27 (2) any other trustee of a management trust created

1 for a person who has only a physical disability.

2 (b) Except as provided by Subsection (a), the ~~[The]~~ court
3 shall require a person~~[, other than a corporate fiduciary,]~~ serving
4 as trustee of a management trust to file with the county clerk a
5 bond that:

6 (1) is in an amount equal to the value of the trust's
7 principal and projected annual income; and

8 (2) meets the conditions the court determines are
9 necessary.

10 SECTION 14. Section 1301.101, Estates Code, as effective
11 January 1, 2014, is amended to conform to Section 31, Chapter 1085
12 (S.B. 1196), Acts of the 82nd Legislature, Regular Session, 2011,
13 and is further amended to read as follows:

14 Sec. 1301.101. REQUIRED TERMS. (a) Except as provided by
15 Subsection (c), a management trust created for a ward or
16 incapacitated person must provide that:

17 (1) the ward or incapacitated person ~~[for whom the~~
18 ~~trust is created]~~ is the sole beneficiary of the trust;

19 (2) the trustee may disburse an amount of the trust's
20 principal or income as the trustee determines is necessary to spend
21 for the health, education, maintenance, or support of the ~~[ward or~~
22 ~~incapacitated]~~ person for whom the trust is created;

23 (3) the trust income that the trustee does not
24 disburse under Subdivision (2) must be added to the trust
25 principal;

26 (4) a trustee that is a corporate fiduciary serves
27 without giving a bond; and

1 (5) subject to the court's approval and Subsection
2 (b), a ~~[the]~~ trustee is entitled to receive reasonable compensation
3 for services the trustee provides to the ~~[ward or incapacitated]~~
4 person for whom the trust is created as the person's trustee.

5 (a-1) A management trust created for a person who has only a
6 physical disability must provide that the trustee of the trust:

7 (1) serves without giving a bond; and

8 (2) is entitled to receive, without the court's
9 approval, reasonable compensation for services the trustee
10 provides to the person as the person's trustee.

11 (b) A trustee's compensation under Subsection (a)(5) must
12 be:

13 (1) paid from the management trust's income,
14 principal, or both; and

15 (2) determined, paid, reduced, and eliminated in the
16 same manner as compensation of a guardian ~~[of an estate]~~ under
17 Subchapter A, Chapter 1155.

18 (c) The court creating or modifying a management trust may
19 omit or modify otherwise applicable terms required by Subsection
20 (a), (a-1), or (b) ~~[(a)(1) or (2) only]~~ if the court is creating the
21 trust for a person who has only a physical disability, or if the
22 court determines that the omission or modification:

23 (1) is necessary and appropriate for the ~~[ward or~~
24 ~~incapacitated]~~ person for whom the trust is created to be eligible
25 to receive public benefits or assistance under a state or federal
26 program that is not otherwise available to the ~~[ward or~~
27 ~~incapacitated]~~ person; or ~~[and]~~

1 (2) is in the [~~ward's or incapacitated person's~~] best
2 interests of the person for whom the trust is created.

3 SECTION 15. Section 1301.102(a), Estates Code, as effective
4 January 1, 2014, is amended to conform to Section 31, Chapter 1085
5 (S.B. 1196), Acts of the 82nd Legislature, Regular Session, 2011,
6 and is further amended to read as follows:

7 (a) A management trust created for a ward or incapacitated
8 person may provide that the trustee make a distribution, payment,
9 use, or application of trust funds for the health, education,
10 maintenance, or support of the [~~ward or incapacitated~~] person for
11 whom the trust is created or of another person whom the [~~ward or~~
12 ~~incapacitated~~] person for whom the trust is created is legally
13 obligated to support:

14 (1) as necessary and without the intervention of:

15 (A) a guardian or other representative of the
16 ward; or

17 (B) a representative of the incapacitated
18 person; and

19 (2) to:

20 (A) the ward's guardian;

21 (B) a person who has physical custody of the
22 [~~ward or incapacitated~~] person for whom the trust is created or of
23 another person whom the [~~ward or incapacitated~~] person for whom the
24 trust is created is legally obligated to support; or

25 (C) a person providing a good or service to the
26 [~~ward or incapacitated~~] person for whom the trust is created or to
27 another person whom the [~~ward or incapacitated~~] person for whom the

1 trust is created is legally obligated to support.

2 SECTION 16. Section 1301.103, Estates Code, as effective
3 January 1, 2014, is amended to read as follows:

4 Sec. 1301.103. ENFORCEABILITY OF CERTAIN TERMS. A
5 provision in a management trust created for a ward or incapacitated
6 person that relieves a trustee from a duty or liability imposed by
7 this chapter or Subtitle B, Title 9, Property Code, is enforceable
8 only if:

9 (1) the provision is limited to specific facts and
10 circumstances unique to the property of that trust and is not
11 applicable generally to the trust; and

12 (2) the court creating or modifying the trust makes a
13 specific finding that there is clear and convincing evidence that
14 the inclusion of the provision is in the best interests of the trust
15 beneficiary.

16 SECTION 17. Section 1301.154(a), Estates Code, as effective
17 January 1, 2014, is amended to read as follows:

18 (a) The trustee of a management trust created for a ward
19 shall prepare and file with the court an annual accounting of
20 transactions in the trust in the same manner and form that is
21 required of a guardian of the estate under this title.

22 SECTION 18. Section 1301.202, Estates Code, as effective
23 January 1, 2014, is amended by adding Subsection (a-1) to read as
24 follows:

25 (a-1) For purposes of a proceeding to determine whether to
26 transfer property from a management trust to a pooled trust
27 subaccount, the court may, but is not required to, appoint an

1 attorney ad litem or guardian ad litem to represent the interests of
2 a person who has only a physical disability for whom the management
3 trust was created.

4 SECTION 19. Section 1155.051, Estates Code, as effective
5 January 1, 2014, is repealed.

6 SECTION 20. (a) Except as otherwise provided by this
7 section, the changes in law made by this Act apply to:

8 (1) a guardianship created before, on, or after the
9 effective date of this Act; and

10 (2) an application for a guardianship pending on, or
11 filed on or after, the effective date of this Act.

12 (b) The changes in law made by this Act to Sections
13 1301.054, 1301.055, 1301.057(b), (c), and (d), 1301.058, 1301.101,
14 and 1301.102(a), Estates Code, apply only to an application for the
15 creation, modification, or termination of a management trust that
16 is filed on or after the effective date of this Act. An application
17 described by this subsection that is filed before the effective
18 date of this Act is governed by the law in effect on the date the
19 application was filed, and the former law is continued in effect for
20 that purpose.

21 (c) The changes in law made by this Act to Sections 1301.103
22 and 1301.154(a), Estates Code, and by Section 1301.202(a-1),
23 Estates Code, as added by this Act, apply to a management trust
24 created before, on, or after the effective date of this Act.

25 SECTION 21. To the extent of any conflict, this Act prevails
26 over another Act of the 83rd Legislature, Regular Session, 2013,
27 relating to nonsubstantive additions to and corrections in enacted

1 codes.

2 SECTION 22. This Act takes effect January 1, 2014.